MALAYSIAN REPORTS

Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors

SUPREME COURT (KUALA LUMPUR) – CIVIL APPLICATION NO 26 OF 1988
HASHIM YEOP A SANI AND HARUN SCJJ, MOHAMED YUSOFF, GUNN CHIT TUAN AND ANUAR JJ
21 AND 22 JULY 1988

Constitutional Law – Application to set aside ex parte order restraining tribunal appointed under art 125(3) of the Federal Constitution from submitting its report – Jurisdiction of Supreme Court – Whether Attorney General entitled to represent the tribunal in the application – Whether tribunal amenable to order of prohibition – Federal Constitution, arts 125(3), (5), & 145

Civil Procedure – Jurisdiction of Supreme Court – Application to set aside ex parte order of Supreme Court – Application to intervene – Courts of Judicature Act 1964

Administrative Law – Whether order of prohibition lies against tribunal set up under art 125(3) of the Constitution – Rules of the High Court 1980, O 92 r 4 – Rules of the Supreme Court 1980, r 4

In this case a tribunal had been set up under art 125(3) to inquire into and make recommendations concerning Tun Dato Haji Salleh Abas to His Majesty the Yang di-Pertuan Agong. The Supreme Court had on 2 July 1988 made an ex parte order restraining the tribunal from submitting any recommendations, report or advice respecting the inquiry to His Majesty the Yang di-Pertuan Agong (see Appendix on p 151). The Attorney General applied by motion to set aside the order on the ground that the making of the said order was wrong in law in the circumstances of the case. Another ground was relied on in this notice of motion but the Attorney General did not proceed with the ground as there was an originating summons for a declaration on the interpretation of ss 38 and 39 of the Courts of Judicature Act 1964 which were referred to in that ground. Two applications were also dealt with by the court. The first was by the five Supreme Court judges who sat in the Supreme Court which issued the ex parte order and who had been suspended and their application was for leave to intervene in the proceeding. The second application was by Tun Haji Mohamed Salleh Abas to strike out the notice of motion of the Attorney General as the tribunal is intended to be independent of the government.

Held: (1) As the basis of the application to intervene, namely, what interpretation should be given to ss 38 and 39 of the Courts of Judicature Act 1964, is no longer in issue, leave to intervene by the five judges was refused. In any event the jurisdiction of the court to allow intervention is entirely discretionary and since the tribunal which is yet to be appointed to inquire into their cases is not a court of law, this is not a proper case to allow leave to intervene.

(2) The Attorney General is a public officer under the Constitution. He was required by the rules of procedure of the tribunal to assist the tribunal. Article 145 of the Constitution property read gives ample power to the Attorney General to represent the government and any body or person performing any functions under the Constitution.

(3) The Supreme Court is principally an appellate court with appellate jurisdiction and it had no jurisdiction to entertain the application to restrain the tribunal in the case as there was no pending appeal.

(4) The functions of the tribunal appointed under art 125(3) of the Constitution is to inquire and investigate on the representation and then report to the Yang di-Pertuan Agong with any recommendation it may make. The tribunal is a body which investigates and does not decide. It is performing a constitutional function. The tribunal should not therefore be restrained from performing its constitutional function.

(5) The members of the tribunal are appointees of the Yang di-Pertuan Agong. It is clear from the language of art 125 that the Yang di-Pertuan Agong is entitled to the report of the tribunal. To restrain the tribunal from submitting their report is in effect to restrain the Yang di-Pertuan Agong from receiving the report.

(6) The restraining order is therefore bad in law, invalid and unenforceable as against the Yang di-Pertuan Agong and the tribunal.

Cases referred to

1 *Re Ong Eng Guan* [1959] MLJ 92 (refd)
2 *Re Chua Ho Ann* [1963] MLJ 193 (refd)
3 *Haji Salleh bin Jafaruddin* v *Datuk Celestine Ujang & Ors* [1986] 2 MLJ 412 (refd)
4 *Sim Kie Chon* v *Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 (refd)
5 *Superintendent of Pudu Prison & Ors* v *Sim Kie Chon* [1986] 1 MLJ 494 (refd)
6 *Election Commission, Malaysia* v *Abdul Fatah bin Haji Haron* [1987] 2 MLJ 716 (refd)
7 *Re Royal Commission on Thomas* [1980] 1 NZLR 602 (not folld)
8 *Assa Singh* v *Menteri Besar, Johore* [1969] 2 MLJ 30 (folld)

Legislation referred to

Courts of Judicature Act 1964
Federal Constitution arts 122(2)(c), 125(3), (5), 145
Rules of the Supreme Court 1980 r 4
Rules of the High Court 1980 O 92 r 4

Raja Abdul Aziz Addruse (*CV Das, P Royan, V George, T Thomas, Z Zakaria* and *D Goon* with him) for the applicant/respondent.

C Abraham (*W Abraham* and *R Lazar* with him) for the interveners.

Tan Sri Abu Talib bin Othman, Attorney General (*T Selventhiranathan*, Senior Federal Counsel with him) for the respondents/applicants.

Cur Adv Vult

Hashim Yeop A Sani SCJ (delivering the judgment of the court): The Attorney General, Malaysia, applied by way of notice of motion dated 11 July 1988 to set aside an ex parte order dated 2 July 1988 restraining the tribunal appointed under art 125(3) of the Federal Constitution from submitting any recommendations, report or advice respecting the inquiry into the representation concerning Tun Dato Haji Mohamed Salleh bin Abas to His Majesty the Yang di-Pertuan Agong until further order. In the notice of motion the grounds relied on for the application were:

(1) that the Supreme Court had no jurisdiction to make the aforesaid order by reason of the fact that the court sat without the direction of the Chief Justice (Malaya), who was then and still is exercising the powers of the Lord President, as required by s 39(1) of the Courts of Judicature Act 1964; and/or

(2) the making of the aforesaid order was wrong in law in any event in the circumstances of the case.

At the outset of the hearing of the notice of motion, the learned Attorney General informed the court that in view of the fact that there is an originating summons in the High Court asking for a declaration on the interpretation of ss 38 and 39 of the Courts of Judicature Act 1964, he was not proceeding on the first ground but would rely solely on the second ground.

Before we dealt with the notice of motion of the learned Attorney General we had earlier in the proceeding dismissed two applications. The first application was by the five Supreme Court judges who sat in the Supreme Court which issued the ex parte order referred to and who are now suspended by the Yang di-Pertuan Agong under art 125(5) of the Constitution pending reference of the representation made against them to the tribunal to be appointed. Their application was for leave to intervene in the proceeding on the ground that the issues to be determined in the notice of motion of the Attorney General are 'identical' with the issues to be considered by the tribunal yet to be appointed. We refused leave to intervene because the basis of their application to intervene, namely, what interpretation should be given to ss 38 and 39 of the Courts of Judicature Act, is no longer an issue to be decided in this proceeding after the Attorney General stated that he was not proceeding with ground one of his application.

Apart from the fact that the basis of the application to intervene having been removed we also noted that the jurisdiction of the court to allow intervention is entirely discretionary and in our opinion since the tribunal which is yet to be appointed is not a court of law, this is not therefore a proper case to allow leave to intervene.

The second application we refused was the application to strike out the notice of motion of the Attorney General. This application was made by Tun Haji Mohamed Salleh bin Abas who obtained the ex parte order in question on 2 July 1988. The grounds relied on to strike out the notice of motion of the Attorney General were, firstly, that the tribunal constituted under art 125(3) of the Constitution is intended to be independent of the government and therefore the Attorney General is not entitled to represent the members of the tribunal; and, secondly, that the Attorney General had in fact participated in the proceedings of the tribunal representing the government and therefore it is now not competent for him to represent the members of the tribunal. Our short answer to that is that the Attorney General is a public officer under the Constitution. He was required by the rules of procedure of the tribunal to assist the tribunal. Article 145 of the Constitution properly read gives ample power to the Attorney General to represent the government and any body or person performing any functions under the Constitution.

Finally we came to the main notice of motion. The Attorney General submitted that there are two grounds why the ex parte order dated 2 July 1988 was wrong in law. The first ground was that the Supreme Court had no original jurisdiction to entertain applications of that nature since there was no pending appeal before the Supreme Court. The jurisdictions of the Supreme Court are set out in the Constitution and the Courts of Judicature Act 1964. It has no original jurisdiction save in hearing applications in respect of pending appeals. The Attorney General referred to the certified true copies of the notes of proceedings kept by the five Supreme Court judges concerned to show that all of them regarded the application before them as 'Supreme Court Civil Application No 26 of 1988' and only in respect of one certified true copy of the record of the proceeding were the words 'appellate jurisdiction' mentioned.

The second ground of the Attorney General to say that the ex parte order dated 2 July 1988 was wrong in law was that it has been the consistent view of the highest court in this country that a tribunal or body performing constitutional functions under the Constitution should not be prevented from performing their functions and that a body which merely acts as an investigating or advisory body is not amenable to an order of prohibition. He referred to *Re Ong Eng Guan*,[1] *Re Chua Ho Ann*,[2] *Hj Salleh bin Jafaruddin* v *Datuk Celestine Ujang & Ors*,[3] *Sim Kie Chon* v *Superintendent of Pudu Prison & Ors*,[4] *Superintendent of Pudu Prison & Ors* v *Sim Kie Chon* [5] and *Election Commission, Malaysia* v *Abdul Fatah bin Haji Haron*.[6]

Raja Abdul Aziz, on the other hand, relied largely on authorities from foreign jurisdictions, for example *Re Royal Commission on Thomas* case,[7] for the view that the supervisory powers of the courts can be extended even to royal commissions. Raja Abdul Aziz would also seem to rely heavily on r 4 of the Rules of the Supreme Court 1980, involving O 92 r 4 of the Rules of the High Court 1980, as conferring jurisdiction to prevent injustice.

Our unanimous view is as follows.

The Supreme Court is principally an appellate court with appellate jurisdiction (see *Assa Singh* v *Mentri Besar, Johore* [8]) An amendment was made to art 121(2)(c) of the Federal Constitution effective from 1 January 1985. But no substantive law has been passed by Parliament to confer other powers than those already found in the Courts of Judicature Act 1964. Therefore there has been no real change since the *Assa Singh* case.[8]

The really vital issue here, however, is whether an interim order in the nature that we have before us now should have been made at all. To resolve that we have to go back to basic principles.

The functions of the tribunal appointed under art 125(3) of the Constitution is to inquire and investigate on the representation and then report to the Yang di-Pertuan Agong with any recommendation it may make. The tribunal is a body which investigates and does not decide. It is performing a constitutional function. The tribunal should not therefore be restrained from performing its constitutional function.

Finally, the members of the tribunal are appointees of the Yang di-Pertuan Agong. From the language of art 125 it is clear that the Yang di-Pertuan Agong is entittled to the report of the tribunal. To restrain the tribunal from submitting their report is in effect to restrain His Majesty from receiving the report.

On the above grounds it is our view that the restraining order is therefore bad in law, invalid and unenforceable as against the Yang di-Pertuan Agong and the tribunal.

Order accordingly.

Solicitors: *Shook Lin & Bok*; *Shearu Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*

Appendix

Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors

SUPREME COURT (KUALA LUMPUR) – CIVIL APPLICATION NO 26 OF 1988
WAN SULEIMAN, SEAH, MOHAMED AZMI, ABDOOLCADER AND WAN HAMZAH SCJJ
2 JULY 1988

ORDER

This ex parte notice of motion coming on for disposal this day in the presence of Raja Aziz Addruse of counsel for the appellant applicant *and upon hearing* counsel as aforesaid *it is ordered* that the tribunal appointed under art 125(3) of the Federal Constitution be restrained from submitting any recommendations report or advice respecting the enquiry into the matter of the applicant Tun Dato Haji Mohamed Salleh bin Abas to His Majesty the Yang Di-Pertuan Agong until further order.

Given under my hand and the seal of the court this 2nd day of July 1988.

Tan Sri Datuk Wan Suleiman bin Pawan Teh
Supreme Court Judge
Supreme Court, Malaysia
Kuala Lumpur

Lim Yak Hua v Eastern & Oriental Hotel (1951) Sdn Bhd

HIGH COURT (PENANG) – CIVIL SUIT NO 23-7-87
EDGAR JOSEPH JR J
14 JULY 1988

Contract – Deposit paid under contract of sale and purchase – Non-completion of contract – Return of deposit – Interest – Date from which interest to be calculated

In this case, the plaintiff had agreed to purchase an apartment in a multi-storey block and had paid the total sum of $183,900 towards the purchase price. The construction of the building could not be proceeded with due to substructural failure. The plaintiff claimed the return of deposit and interest thereon. It was agreed by the defendant that interest was payable at the rate of 8% pa from the date of accrual of action, that is, 1 January 1986 until date of judgment and thereafter interest at the same rate until realization. The plaintiff contended that interest at the rate of 8% was also payable from the date of each of the payments of the deposit to the date of judgment and thereafter interest at the same rate on the aggregate of such sums until realization. The dispute was thus limited to the sole question: What is the pre-judgment period in respect of which interest at the agreed rate of 8% was payable?

Held: (1) The principle underlying the award of interest is not to compensate a plaintiff for any damage done, but for him being kept out of his money.

(2) In an action for recovery of the deposit paid under a contract of sale and purchase, the court has a discretion as to whether or not to allow interest and from what date it should be calculated. Where the non-completion is the fault of the vendor and such fault existed at the date of the contract, as for example, not having any title, interest will be allowed from the date of payment as a rule.

(3) In this case the defendant had accepted the opinion of their experts as to the substructural failure most probably on 1 July 1983. The defendant, however, did not inform the plaintiff of this until 16 October 1984 and was therefore guilty of inordinate delay and so to this extent was at fault.

(4) In the exercise of the court's discretion, interest would be awarded at the agreed rate of 8% pa on the aggregate of the sums deposited from 1 July 1983 until date of judgment and thereafter pursuant to O 42 r 12 of the Rules of the High Court 1980 at the same rate until realization.

Cases referred to

1 *The London, Chatham & Dover Railway* v *The South Eastern Railway Co* [1893] AC 429 (folld)
2 *Murtadza bin Mohamed Hassan* v *Chong Swee Pian* [1980] 1 MLJ 216 (refd)
3 *Macdonald* v *Marson* (1913) 33 NZLR 248; 16 NZGLR 330 (refd)
4 *Re Hargreaves & Thompson's Contract* (1886) 32 Ch D 454 (refd)
5 *Turner* v *Marriott* (1867) LR 3 Eq 744 (refd)
6 *Day* v *Singleton* (1899) 2 Ch 320 (refd)
7 *Carlish* v *Salt* [1906] 1 Ch 335 (refd)
8 *Re Bryant & Barningham's Contract* (1890) 44 Ch D 218 (refd)
9 *Weston* v *Savage* (1878-79) 10 Ch D 736 (refd)
10 *Skinner* v *James Syphonic Visible Measures Ltd* (1927) 28 SR NSW 20; 44 WN 156 refd)